Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BARTHOLOMEW J. LAWSON
and NANCY A. LESTER,

Petitioners,

v.

ROBERT ABRAMS, individually and as
New York State Attorney General, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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136 pp

QUESTIONS PRESENTED

I. Whether there are any objective standards employed by the circuit courts of appeals to determine if a review by a district court judge of a magistrate judge's report and recommendation, prepared pursuant to 28 U.S.C. § 636(b)(1)(B)(C), to which objection was made, met de novo statutory and Constitutional standards.

II. Whether a circuit court has a duty to perform an "independent" or "plenary" review of a district court's decision which failed to address and correct clear errors of fact and law in a magistrate's report and recommendation, prepared pursuant to 28 U.S.C. § 636(b)(1)(B)(C), to which objection was made.

LIST OF PARTIES

Additional Respondents:

EDWARD KURIANSKY, individually and as New York State Deputy Attorney General for Medicaid Fraud Control, STEPHEN J. CALVACCA, individually and as an employee of the New York State Deputy Attorney General for Medicaid Fraud Control, JAMES SCARINGE, individually and as an employee of the New York State Deputy Attorney General for Medicaid Fraud Control, JOSEPH LOMBARDO, individually and as an employee of the New York State Deputy Attorney General for Medicaid Fraud Control, BARRY FRIEDMAN, individually and as an employee of the New York State Deputy Attorney General for Medicaid Fraud Control, EDWARD KAYE, individually and as an officer and employee of District 1199, the Estate of LEON DAVIS, individually and as an officer and employee of District 1199, DORIS TURNER, individually and as an officer and employee of District 1199, JUDITH BEREK, individually and as an employee of District 1199, PHILIP WITKOWER, individually and as an employee of District 1199, DIANE SAVAGE (also known as DIANE IANDOLI, also known as DIANE BIANCULI), individually and as an employee of District 1199, and EUGENE NACHAMKIN.

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Bartholomew J. Lawson and Nancy A. Lester respectfully petition for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-6a) and of the district court (App., *infra*, 7a-12a) are unreported. The appendix also includes the report and recommendation of the magistrate judge (App., *infra*, 17a-97a), the order denying a rehearing by the circuit court (App., *infra*, 98a-99a), the judgment and the amended judgment of the district court (App., *infra*, 13a-14a; 15a-16a).

STATEMENT OF JURISDICTION

Petitioners seek a writ of certiorari to the Court of Appeals for the Second Circuit to obtain a review of the Summary Order of said court entered on December 23, 1998. Petitioners, pursuant to Fed. R. App. P. 40 and 35, on January 6, 1999, served and filed a brief for rehearing and a petition for rehearing en banc of the Summary Order. By order entered on March 19, 1999, Petitioners' request for a rehearing was denied. (App., *infra*, 98a-99a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section I of the Constitution of the United States provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

In 1976 Congress amended section 28 U.S.C. § 636(b)(1) which is at issue in both of the questions presented. It now reads in applicable parts:

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion . . . for summary judgment. . . .
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), . . .
>
> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

STATEMENT OF THE CASE

In early 1981, Petitioner Lawson met with Respondent Davis, the president of District 1199 of the Hospital and Health Care Workers Union, in an effort to settle a labor dispute at Woodhull Nursing Home in Queens, New York. Petitioner Lawson was the Executive Director of the Greater New York Health Care Facilities Association, a nursing home trade association. At the meeting Respondent Davis threatened to destroy Lawson and drive him out of health care in New York. On January 28, 1981, Respondent Davis met with Respondent Attorney General Abrams in an effort to enlist his aid in removing Lawson from the nursing home industry. Respondent Abrams began an investigation of union charges leveled against Lawson.

In February 1981, one Aaron Elbogen was fired as the chief administrator of Woodhull. Elbogen, bitter at Lawson and blaming him for his recent firing, met Union Respondents Savage and Kaye and told them of information

he had received that Lawson paid one Meyer Bendet, a printer and community activist in Brooklyn, New York, to blow up a Union trailer parked near a nursing home operated by Petitioners in Brooklyn, New York, which had been beset by a violent strike conducted by District 1199. Petitioner Lawson acknowledges authorizing a $5000 payment to Bendet to provide community information about the strike but denies instructing him to blow up the trailer.

Respondent Savage then informed the Office of Special Prosecutor (OSP) of this new charge. OSP and Savage then engaged in a series of acts in order to try to convict Lawson of a crime. In answer to Interrogatories, Defendant Savage said she "was told that . . . [she] had been made an agent of the Office of the Deputy Attorney General for Medicaid Control. . . ." She said she "reported to [Respondent] Stephen Calvacca, [Respondent] James Scaringe and Paul Saqqal in addition to my union superiors." (C.A. Jt. App. A-1109; A-468, ¶¶11, 12).[1]

A bogus invoice documenting the $5000 payment was prepared by Bendet and OSP, following a taped phone conversation between Bendet and Lawson, and it was placed in the files of Lawson's Company by Bendet on June 1, 1981. A copy of an incomplete cost report contained in the files of Petitioners' nursing home was removed by one Israel Fogel and given to Union Respondent Savage, who gave it to State Respondent Scaringe on July 21, 1981. This meeting was authorized by the OSP lead prosecutor, Respondent Calvacca. In deposition testimony, Fogel gave conflicting statements as to how he obtained this document. Secret

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1. In this petition we will refer to the Joint Appendix filed with the court of appeals as "C. A. Jt. App."

grand jury matters were disclosed by State Respondent Scaringe to Union Respondent Savage; disclosures were made to the media resulting in a scathing article against Lawson when the grand jury was still meeting on the matter. Finally, State Respondent Lombardo, an accountant, without justification, testified to the grand jury that Lawson had filed a false Medicaid claim. Petitioner Lawson was indicted by a grand jury on April 23, 1982, and again on May 4, 1983. He was quickly acquitted at trial. One juror was quoted in the press as saying that Lawson had been "framed." (C.A. Jt. App. A-1154).

This case was filed on November 1, 1984, in the United States District Court, Eastern District of New York. Petitioners were then husband and wife and business associates. Petitioners charged, pursuant to 42 U.S.C. § 1983, a conspiracy by the Respondents to deprive Petitioners of their civil rights under the Constitution of the United States and for additional causes of action for torts under state law.[2] District Court Judge Carol B. Amon referred the summary judgment motions by the State and Union Respondents on March 18, 1994, to Magistrate Judge Roanne L. Mann for a report and recommendation.

On March 12, 1997, Magistrate Judge Mann issued a lengthy report and recommendation which ruled in favor of the State and Union Respondents and recommended that their motions for summary judgment be granted regarding the federal claim and further recommended either dismissing the state claims outright or declaring the court without jurisdiction over them. (App., *infra*, 17a-97a).

2. An earlier related decision by the Court of Appeals for the Second Circuit in this case is reported as *Lawson v. Abrams*, 863 F.2d 260 (2d Cir. 1988).

By Memorandum and Order of September 25, 1997, Judge Amon accepted the report and recommendation, with some corrections, and dismissed Petitioners' complaint in its entirety as to all the State and Union Respondents both as to the federal and state claims. Judge Amon corrected the magistrate's incorrect citation of 28 U.S.C. § 636(b)(1)(A) as the basis of jurisdiction, and replaced it with 28 U.S.C. § 636(b)(1)(B). The court made a minor change to the wiretap statute cited by the magistrate. 18 U.S.C. § 2511(2)(d). Judge Amon further suggested a more stringent test for malicious prosecution than stated in the Report; otherwise, she adopted the magistrate judge's reasoning and recommendations and concluded by saying, "Despite years of discovery . . . plaintiffs have been [sic] not been able to provide evidence sufficient to save their claims from summary judgment." (App., *infra,* 7a-12a).

On December 23, 1998, the court of appeals, in its Summary Order, rejected Petitioners' argument that Judge Amon failed to perform a proper *de novo* review. The court of appeals further rejected Petitioners' argument "that the magistrate judge and the district court resolved genuine issues of material fact in favor of defendants-appellees . . . [as being] without merit." (App., *infra*, 3a-5a). Next, the appellate court stated, relative to the events of July 21, 1981, "Even if the evidence had been removed without consent, this would not avail plaintiffs-appellants in any of their claims in this case. While that fact might support a claim under [sec.] 1983 for an unreasonable search, such a claim was not pleaded in the complaint."[3] (App., *infra*, 5a). Finally, the circuit court rejected Petitioners' argument "that

3. Petitioners deny this factual statement as described in the section titled, "III The Decision of The Court of Appeals is Erroneous."

the district court incorrectly decided the issues of conspiracy and lack of probable cause as a matter of law." (App., *infra*, 5a-6a).

REASONS FOR GRANTING THE WRIT

We will describe in this section the many conflicting United States appellate court decisions which have attempted to implement this Court's decision in *United States v. Raddatz*, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424, (Blackmun, J., concurring, Powell, J., concurring in part and dissenting in part, Stewart, J., with Brennan, J., and Marshall, J., dissenting, Marshall, J., with Brennan, J., dissenting), *reh'g denied,* 448 U.S. 916, 101 S. Ct. 36, 65 L. Ed. 2d 1179 (1980). We will show that, as to both questions presented, there is substantial disagreement among the circuit courts of appeals concerning the implementation of *Raddatz* and, indeed, there are internal conflicts within the Tenth and Eleventh Circuit Courts of Appeal on these issues.

In 1980, a majority of this Court found that 28 U.S.C. § 636(b)(1)(B)(C) as revised to be Constitutional. Speaking for the majority Chief Justice Burger stated:

> The House Judiciary Committee added to the Senate bill the present language of the statute, providing that the judge shall make a "de novo determination" of contested portions of the magistrate's report upon objection by any party. According to the House Report, "[t]he amendment states expressly what the Senate implied: i.e. that the district judge in making the ultimate determination of the matter, would have

> to give fresh consideration to those issues to which specific objection has been made by a party."

447 U.S. at 675, 100 S. Ct. at 2412.

Justice Marshall, joined by Justice Brennan, in dissent, stated, "the Framers of the Constitution believed . . . that the judicial power of the United States would be placed in a body of judges insulated from majoritarian pressures. . . . In this case it is agreed that magistrates are not Art. III judges." *Raddatz*, 447 U.S. at 704, 100 S. Ct. at 2427.

The criteria used by a circuit court of appeals to review a district court's factual determinations, absent a referral to a magistrate pursuant to 28 U.S.C. § 636(b)(1)(B), is noncontroversial. Fed. R. Civ. P. 52(a) provides: "In all actions tried upon the facts without a jury . . . , [f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, ..."

The circuit courts of appeals, however, have taken inconsistent positions on the applicability of Rule 52(a) when the district court refers matters to a magistrate for a report and recommendation under 636(b)(1)(B) and either adopts the magistrate's position or renders "a short, almost summary opinion. . . ." *Equal Employment Opportunity Commission v. Keco Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984).

Circuit Judge Easterbrook in *United States v. Rodriguez*, 888 F.2d 519 (7th Cir. 1989) took an extremely deferential position concerning the role of a circuit court in evaluating whether a district court properly conducted a

de novo review of a magistrate's report and recommendations under 28 U.S.C. § 636(b)(1)(C). Judge Easterbrook acknowledged that:

> The argument for de novo appellate review is that the magistrate, not accorded the tenure and salary guarantees of Article III, cannot make binding decisions. An Article III judge must review de novo any contested findings of fact and proposed conclusions of law. . . . When the district judge abdicates to the magistrate, the argument runs, the appellate judges must supply the necessary de novo review. The Fifth Circuit adopted that view, United States v. Herbst, 641 F.2d 1161, 1167 (5th Cir. 1981), and the Eleventh Circuit took it over by inheritance, United States v. McKennon, 814 F.2d 1539, 1543 n.6 (11th Cir. 1987). Without recognizing the conflict, we took the contrary position in United States v. Hardin, 710 F.2d 1231, 1235-36 (7th Cir. 1983). . . . Rodriguez wants us to abandon Hardin and adopt Herbst, but we think the approach of Hardin sound. . . .)

Rodriguez, 888 F.2d at 521.

In this petition we will address the two issues described by Judge Easterbrook, namely: (1) what constitutes a proper *de novo* review under its implementing statute and Article III of the United States Constitution; and (2) whether the circuit court is required by statutory and Constitutional principles to review the decision of the district court under the "independent" or "plenary" standard or the "clear error" standard. As he stated, Judge Easterbrook was aware of a

dispute between his Seventh Circuit and the Fifth and Eleventh Circuits.[4] The dispute is, however, broader than he described. We will cite cases in the Second, Third, Fourth, Sixth, Eighth and Tenth Circuits where conflicting positions have been taken on these issues. 888 F.2d at 521.

I.

THE MEANING OF *DE NOVO* REVIEW

A. Second, Seventh and Tenth Circuits

Perhaps the strongest statement of the deferential position taken by any circuit court of appeals on the issue of what constitutes a *de novo* review under 28 U.S.C. § 636(b)(1)(C) was that by the Tenth Circuit in *Andrews v. Deland*, 943 F.2d 1162, 1168-1170 (10th Cir. 1991), *cert. denied*, 502 U.S. 1110, 112 S. Ct. 1213, 117 L. Ed. 2d 451, *reh'g denied*, 503 U.S. 967, 112 S. Ct. 1580, 118 L. Ed. 2d 221 (1992). In this capital punishment case, the magistrate initially prepared an 89-page report and recommendation and subsequently a 68-page report and recommendation. The district court merely adopted the magistrate judge's report and recommendation. The circuit court of appeals reported that:

> Andrews argues that the brevity of the district court's orders adopting the magistrate judge's

4. The Eleventh Circuit Court which was separated from the Fifth Circuit in 1981 has adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). *See also United States v. McKennon*, 814 F.2d 1539, 1543 n.6 (11th Cir. 1987) (per curiam).

> two reports, the lack of a specific discussion in those orders of many of the issues or the record in this case, and the rapidity with which the district court reviewed and adopted the reports all indicate that the district court failed to conduct the kind of de novo review required by section 636(b)(1). We disagree.

The court of appeals concluded, "We will not look behind a district court's express statement that it engaged in a *de novo* review of the record." *Id.* at 1171.[5] *See also Clark v. Poulton*, 963 F.2d 1361, 1368 (10th Cir.), *cert. denied*, 506 U.S. 1014, 113 S. Ct. 635, 121 L. Ed. 2d 566 (1992).

As was stated by the circuit court of appeals in *Rodriguez*, the Seventh Circuit adopted the "deferential" position in *United States v. Hardin*, 710 F.2d 1231 (7th Cir.), *cert. denied*, 464 U.S. 918, 104 S. Ct. 286, 78 L. Ed. 2d 263 (1983). In *Hardin*, the court stated, "Thus, on appeal, the district court's decision to adopt the magistrate's credibility rulings without hearing the testimony can only be said to be abuse of discretion if the record reflects that those rulings were themselves clearly erroneous and entitled to no weight." 710 F.2d at 1235.

The Second Circuit Court of Appeals, from which this petition originates, has also taken a deferential position on this subject. In *Pan American World Airways, Inc., v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 894 F.2d 36, 40

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5. Andrews' death sentence was carried out on July 30, 1992. (Death Penalty Information Center, 1320 Eighteenth Street, N.W., Washington, D.C. 20036.)

n.3 (2d Cir. 1990) the court of appeals stated, "We find meritless Pan Am's procedural complaints. . . . Judge Glasser reviewed the record and the magistrate's recommendation and heard oral argument. That constituted adequate *de novo* review under 28 U.S.C. [sec.] 636(b)(1)." (citing *Raddatz*, 447 U.S. at 674-76, 100 S. Ct. at 2411-13.) *See also Murphy v. International Business Machines Corp.*, 23 F.3d 719, 722 (2d Cir.) (per curiam), *cert. denied*, 513 U.S. 876, 115 S. Ct. 204, 130 L. Ed. 2d 134 (1994). ("We do not construe the brevity of the order as an indication that the objections were not given due consideration, especially in light of the correctness of that report and the evident lack of merit in Murphy's objections.")

In the instant case, in a ruling similar to that in *Andrews*, *Rodriguez* and *Clark*, the Court of Appeals for the Second Circuit ruled that:

> Judge Amon's opinion expressly states that the district court, "having read the Report, plaintiffs' objections, defendants' replies, and having read and reviewed the record in this matter *de novo*, adopts the findings and recommendations in the Report and grants defendants' motion for summary judgment in its entirety." We have no reason to question that all this was done, and we decline to impose the requirement that a district court parrot each finding and recommendation that it chooses to adopt.

(App., *infra*, 4a).

B. Fourth, Fifth, Sixth, Eighth and Tenth Circuits

In contrast to the decisions in the Second, Seventh and Tenth Circuit Courts of Appeals the appellate courts for the Fourth, Fifth, Sixth, Eighth and even the Tenth Circuits Courts of Appeals have ruled that a failure of the district court to obtain and review a transcript or recording of testimony before the magistrate provides an objective standard for finding that a *de novo* review was not afforded to the objecting party. *Orpiano v. Johnson*, 687 F.2d 44, 48 (4th Cir. 1982); *United States v. Elsoffer*, 644 F.2d 357, 359 (5th Cir. 1981) (per curiam); *Hernandez v. Estelle*, 711 F.2d 619, 620 (5th Cir. 1983) (per curiam); *Cay v. Estelle*, 789 F.2d 318, 327 (5th Cir. 1986); *Hill v. Duriron Company, Inc.*, 656 F.2d 1208, 1215 (6th Cir. 1981); *Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989); *Taylor v. Farrier*, 910 F.2d 518, 519-20 (8th Cir. 1990); *Nabors v. United States*, 929 F.2d 354, 355 (8th Cir. 1990) (per curiam); *Gee v. Estes*, 829 F.2d 1005, 1008-09 (10th Cir. 1987) (per curiam).

We note that the decision in *Gee v. Estes* preceded *Andrews v. Deland*, 943 F.2d 1162, (10th Cir. 1991). The court in *Andrews* distinguished its decision from that in *Gee* by quoting from the latter case, "We have also noted that 'an appellate court must be satisfied that a district judge has exercised his nondelegable authority by considering the actual testimony, and not merely by reviewing the magistrate's report and recommendations.' " *Andrews*, 943 F.2d at 1170; *Gee* 829 F.2d at 1008-09 (quoting *United States v. Elsoffer*, 644 F.2d at 359.[6]

6. Petitioners are not alleging that there was such a transcript or recording in the instant case. We note, moreover, that testimony of witnesses before a magistrate is not generally present in a summary judgment case. *See* Fed. R. Civ. P. 56(c). *But see Equal Employment Opportunity Commission v. Keco Industries, Inc.*, 748 F.2d 1097, 1099 (6th Cir. 1984).

C. Fourth, Sixth and Eleventh Circuits

The failure to obtain and review a transcript or recording of testimony before the magistrate judge, however, is not the only objective standard by which circuit courts have found a failure by a district court to perform a *de novo* review. The appellate courts in the Fourth, Sixth and Eleventh Circuits have so ruled. The reasons given for such findings are: (1) failure to review "objections [which] specifically challenged the magistrate's proposed factual findings" was reversible error. *Orpiano v. Johnson*, 687 F.2d at 48; (2) "the district court failed to review all of the defendant's objections." *United States v. Shami*, 754 F.2d 670, 672 (6th Cir. 1985) (per curiam); (3) "[t]he district court, in a short, almost summary opinion, adopted the magistrate's findings and conclusion. . . ." *Equal Employment Opportunity Commission v. Keco Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); and (4) failure to provide independent consideration of factual issues. *Lo Conte v. Dugger*, 847 F.2d 745, 750 (11th Cir.), *cert. denied*, 488 U.S. 958, 109 S. Ct. 397, 102 L. Ed. 2d 386 (1988). ("As the use of the phrase de novo implies, the district court's consideration of the factual issue must be independent and based upon the record before the court.")

Under the decisions in the Fourth, Sixth and Eleventh Circuit Courts of Appeals, we are confident that Judge Amon's brief Memorandum and Order would fail to meet their *de novo* standards. Judge Amon failed to completely review all of our objections, which was proscribed in *Orpiano,* 687 F.2d at 48 and *Shami,* 754 F.2d at 672; Judge Amon's Memorandum and Order was short and summary which was proscribed in *Keco Industries*, 748 F.2d at 1102; and Judge Amon's Memorandum and Order failed to provide independent consideration of factual issues which was proscribed in *Lo Conte*, 847 F.2d at 750.

II.

THE CIRCUIT COURTS OF APPEALS' STANDARDS OF REVIEW OF FINDINGS OF FACT AND MIXED QUESTIONS OF FACT AND OF LAW

Just as with the meaning of *de novo* review by the district court of a magistrate's report and recommendations, there are disputes among the Second, Third, Fifth, Sixth, Seventh, Eighth and Eleventh Circuit Courts of Appeals on the standard of review by the circuit courts of a district court's decision.

A. Second, Seventh, Eighth and Eleventh Circuit Courts of Appeals

Again, one side of the argument is well presented by Judge Easterbrook in *United States v. Rodriguez*, 888 F.2d 519, 521-22 (7th Cir. 1989). In *Rodriguez*, Judge Easterbrook stated:

> On occasion this court affirms a judgment on the basis of the district court's opinion. Affirming by adoption does not imply that we neglected our duties; it means, rather, that after independent review we came to the same conclusions as the district judge for the reasons that judge gave, rendering further explanation otiose. . . . We therefore reiterate the conclusion of Hardin that the standard of appellate review does not depend on whether a district judge adopted the magistrate's report or wrote a new opinion. The questions central to this case . . . depend on findings of fact that we review only for clear

> error; questions of characterization (was the consent "effective"?) also are fact-specific matters reviewed on a deferential standard.[7]

In *Jeffrey S. v. State Board of Education of State of Georgia*, 896 F.2d 507, 513 (11th Cir. 1990) (per curiam) the court ruled that "the clearly erroneous standard of review applies to a magistrate's findings of fact only on appeal." The Eighth Circuit Court of Appeals in *United States v. Turpin*, 707 F.2d 332, 334 (8th Cir.), *reh'g and reh'g en banc denied* (1983) applied the clearly erroneous standard to the mixed fact and law situation involving a voluntary confession because "the issue of consent is usually a factual one, a district court's finding of [voluntariness] must be accepted on appeal unless it is clearly erroneous." (citation omitted). *But see also United States v. Campbell*, 843 F.2d 1089, 1092 (8th Cir.), *reh'g and reh'g en banc denied* (1988) ("The findings with respect to the historical facts are reviewed under the clearly erroneous standard; the ultimate conclusion, however is subject to de novo review.") (citing *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5, 100 S. Ct. 1870, 1875-76 n.5, 64 L. Ed. 2d 497 (White, J. with

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7. The Seventh Circuit Court of Appeals in *United States v. D'Antoni*, 856 F.2d 975, 978 (7th Cir. 1988) defined the term "clearly erroneous." The definition is:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. [citation omitted] Where there are two permissible views of evidence, the factfinder's choice between them cannot be clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985).

Brennan, J., Marshall, J., dissenting and Stevens, J., dissenting), *reh'g denied*, 448 U.S. 908, 100 S. Ct. 3051, 65 L. Ed. 2d 1138 (1980).)[8]

As we stated *supra*, the Second Circuit Court of Appeals in *Murphy v. International Business Machines Corp.*, 23 F.3d 719 (2d Cir. 1994) (per curiam), fell well short of a plenary review of the district court's summary judgment decision.

Finally, in the instant case, the Court of Appeals for the Second Circuit approved the decision of the district court but never expressly defined what standard of review it employed. (App., *infra,* 1a-6a). It is clear, moreover, that the circuit court of appeals in the instant case failed to perform an "independent" or "plenary" review because of a number of errors it made concerning the Record in this case and its failure to address and correct the clear errors in the district court's opinion as further described in the section titled, "III The Decision of the Court of Appeals is Erroneous," *infra.*

B. Third, Fifth, Sixth and Eleventh Circuit Courts of Appeals

The Eleventh Circuit Court of Appeals, in an apparent conflict with its later decision in *Jeffrey S.*, took a conflicting position in *United States v. McKennon*, 814 F.2d 1539, 1543 n.6 (11th Cir. 1987) (per curiam). The circuit court of appeals

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8. This Court's decision in *Mendenhall* is frequently cited and extremely important to understanding the standards for a circuit court to follow in reviewing a district court's decision, but it did not involve a § 636(b)(1) referral to a magistrate.

initially acknowledged that, "[t]he first inquiry is a factual determination which is generally reviewed under a clearly erroneous standard." (citations omitted). However, in a footnote, the court clarified this comment by stating, "Binding precedent in this circuit suggests that when the district court merely adopts a magistrate's report and recommendation, reviewing courts are not bound by the clearly erroneous standard." (citations omitted). *See also United States v. Pulvano*, 629 F.2d 1151, 1156-57 n.7 (5th Cir. 1980) ("When, as in a case such as this, the District Court bases its ruling strictly on written evidence and stipulated facts, our review is not limited to the clearly erroneous standard."). In *Pulvano*, the court also noted the lack of clarity of the law on this subject as follows:

> We note that this Court and the Supreme Court have muddied the waters with regard to the proper standard of review. (citation omitted) In Mendenhall the Supreme Court vaguely indicates that clearly erroneous is the correct standard [citation omitted]. . . . Faced with such lack of clarity, we feel bound to follow this Court's most definitive statement that, when the District Court's voluntariness determination is based solely on transcripts and undisputed facts, we must make an independent review. (citation omitted)

See also Lo Conte v. Dugger, 847 F.2d 745, 750 (11th Cir. 1988). ("Thus, . . . all of the findings of fact reached by the district court . . . are subject to reversal on appeal only if clearly erroneous. . . . [But] mixed questions of fact and law . . . are, therefore, subject to independent review on appeal.") (citations omitted).

Finally, the Third and Sixth Circuits ruled, in § 636(b)(1)(B) cases involving a summary judgment, the review by a circuit court of appeals must be plenary. *Coolspring Stone Supply, Inc., v. American States Life Insurance Company*, 10 F.3d 144, 146 (3d Cir. 1993) and *Equal Employment Opportunities Commission v. Keco Industries, Inc.*, 748 F.2d 1097, 1101 (6th Cir. 1984). The Third Circuit Court of Appeals in *Coolspring* ruled, "Our standard of review on an appeal from a grant of summary judgment is plenary. [citation omitted] We review the facts in the light most favorable to the party against whom summary judgment was entered. *See White v. Westinghouse Elec. Co.*, 862 F.2d 56, 59 (3d Cir. 1988)." In *Keco Industries*, the court engaged in a plenary review and reversed the district court based on "erroneous," not "clearly erroneous," standard. 748 F.2d at 1101.

III.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

A. In evaluating whether Judge Amon gave "fresh consideration" to the issues raised in our Objections to Magistrate Mann's report and recommendation, the Court of Appeals for the Second Circuit found that it had no reason to question Judge Amon's statement that she performed a *de novo* review as discussed *supra* in Section I, "The Meaning of De Novo Review." (App., *infra,* 4a).

The circuit court, however, overlooked the key part of our argument which we made in our Brief for Petition for Rehearing En Banc. Both the magistrate judge and Judge Amon made obvious errors in at least three instances.

By failing to review and correct these errors, the circuit court has transformed 28 U.S.C. § 636(b)(1) from a protective device into a limiting standard which makes it possible to deny the losing party any meaningful review by a constitutional judicial officer. Parroting, as discussed by the court of appeals, is not the issue; clear, demonstrable errors are; and we received no review of these errors by Article III judges.

First, Judge Amon made only a minor correction to the magistrate judge's representation of the wiretap statute but failed to address the substantive difference between the cited 1986 statute and the 1968 statute which was in effect in 1981. (App., *infra*, 10a, n.1) 18 U.S.C. § 2511(2)(d); *See Meredith v. Gavin*, 446 F.2d 794, 799 (8th Cir. 1971); 114 Cong. Rec. 14694-14695 (May 23, 1968).[9] Second, Magistrate Judge Mann conceded that Israel Fogel's removal of the incomplete cost report from the nursing home, then controlled by the Petitioners, on July 21, 1981, would be a constitutional violation if Fogel conspired with OSP to illegally obtain the document. The magistrate judge, in error, then concluded there "was uncontradicted evidence" that Fogel legally obtained the document from an official of the nursing home. (App., *infra*, 64a). In our Objections, we brought to Judge Amon's attention the existence of contradictory evidence in the Record. (C.A. Jt. App. A-1365-66; A-127). Magistrate Mann quoted from page 110 of Fogel's deposition, but she failed to cite page 118 in which Fogel admitted that he took the cost report from the official's desk. Further, we informed the district

9. Respondent Savage made twelve tape recordings. (C.A. Jt. App. A-578-79). Savage made four such tape recordings at the request of, and with the assistance from, OSP. (App. *infra*, 24a, n.8).

court that, in the suppression hearing of October 17, 1983, Justice Bernstein of the New York Supreme Court found that Fogel did remove the papers from the nursing home. (C.A. Jt. App. A-1366). Nevertheless, Judge Amon failed to address this issue. Third, in discussing the submission of a false invoice for payment by the Department of Health, Magistrate Judge Mann ruled, "Lawson obviously was predisposed to submit a misleading invoice to DOH." (App., *infra*, 69a). The magistrate judge cited nothing in the Record to support such a predisposition yet she resolved the question against him. Judge Amon, without explanation, stated that the "Magistrate Judge . . . did not, as plaintiffs contend, resolve disputed facts against the plaintiffs." (App., *infra*, 11a).

B. The circuit court of appeals also made an error in evaluating the events of July 21, 1981. The appellate court said, "Even if the evidence had been removed without consent, this would not avail plaintiffs-appellants in any of their claims in this case. While that fact might support a claim under [sec.] 1983 for an unreasonable search, such a claim was not pleaded in the complaint." (App., *infra,* 5a). This is incorrect; it was pleaded in paragraph 78 of our Complaint as follows: "shortly thereafter, Fogel, Savage and the Deputy Attorney General's office agreed, that Fogel would steal a copy of the incomplete Institute cost report from plaintiff Lawson; on July 21, 1981, Fogel gave a copy of the purloined cost report to the Deputy Attorney General's office through Savage. . . ." (C.A. Jt. App. at A-65).

The circuit court, in discussing the submission of the false invoice for payment by the Department of Health, stated that, "plaintiffs-appellants again fail to demonstrate

that a genuine issue of material fact was resolved against them." (App., *infra,* 5a). No explanation for this statement was given by the circuit court, but the submission clearly is material because this invoice was the gravamen of two counts in the indictment against Petitioner Lawson. (C.A. Jt. App. A-378-79; A-1026-27).

C. Petitioners argue that the Summary Order is inconsistent with prior decisions of the Second Circuit Court of Appeals on the issues of conspiracy and probable cause. *Rounseville v. Zahl*, 13 F.3d 625 (2d Cir. 1994); *Marshall v. Sullivan*, 105 F.3d 47 (2d Cir. 1996). Of even greater importance, the Summary Order is in conflict with this Court's decisions in *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (Black, J., concurring, Brennan, J., concurring in part and dissenting in part, Douglas, J., dissenting in part) and in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (Brennan, J., dissenting, Rehnquist, J., with Burger, C. J., dissenting). In *Adickes* this court ruled that the proof of a conspiracy under 42 U.S.C. § 1983 may rest on the "sequence of events" in the case and that the moving party at the summary judgment stage has "the burden of showing the absence of a genuine issue as to any material fact" relating to the conspiracy. This Court also noted that conspiracies are difficult to prove "especially given the fact that the noncircumstantial evidence . . . could only come from adverse witnesses." 398 U.S. at 157, 90 S. Ct. at 1608. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986) (White, J., concurring, Brennan J., with Burger, C. J., and Blackmun, J., dissenting, Stevens, J., dissenting), *cert. denied*, 484 U.S. 1066, 108 S. Ct. 1028, 98 L. Ed. 2d 992 (1988), in which this Court, in a nonconspiratorial case, refined the meaning

of its holding in *Adickes*, but expressly ruled that its decision would be the same under the *Celotex* refinement "on the basis of the showing before the Court in Adickes. . . ." *Celotex*, 477 U.S. at 325, 106 S. Ct. at 2554.[10] Further, in *Anderson*, this Court ruled that "it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. at 249, 106 S. Ct. at 2511. Nevertheless, in the Summary Order the court of appeals concluded, "It is incumbent on a plaintiff to state more than conclusory allegations to avoid dismissal of a claim predicated on a conspiracy to deprive him of his constitutional rights." (App., *infra*, 5a). This ruling is inconsistent with *Adickes* and *Celotex*.

Next, the court of appeals dismissed our argument regarding probable cause by stating, "After extensive

10. This Court held in *Celotex*,

> But we do not think the Adickes language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, . . . the burden on the moving party may be discharged by "showing" — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case.

Celotex, 477 U.S. at 325, 106 S. Ct. at 2554. Petitioners argue that the "sequence of events" as described in the "Statement of the Case" meets the challenge in *Celotex* for the nonmoving party to show there is "evidence to support" its case. *Id.*

discovery, plaintiffs-appellants have failed to submit evidence sufficient to create a genuine factual issue as to whether this presumption could be overcome, and the matter was appropriately resolved at summary judgment." (App., *infra*, 6a). In *Marshall*, 105 F.3d at 52-53, however, this court of appeals stated:

> Of course, it is impossible for the Court, on a motion based merely on affidavits, to evaluate the truth of . . . testimony upon which the charge is based. Nor can we evaluate . . . testimony . . . as to what if anything took place during the private conversation. These remain disputed issues which must be tried by a jury.

Finally, the appellate court in *Rounseville* clarified the rule in this circuit on the issue of probable cause. The court stated:

> The New York Court of Appeals has recently explained in this exact context that: the issue of probable cause is a question of law to be decided by the court only when there is no dispute as to the facts or the proper inferences to be drawn from such facts. . . . Where there is "conflicting evidence, from which reasonable persons might draw different inferences . . . the question [is] for the jury."

Rounseville, 13 F.3d at 630; *Parkin v. Cornell University*, 78 N.Y. 2d 523, 529, 577 N.Y.S. 2d 227, 229-30, 583 N.E. 2d 939, 942 (1991).

We submitted such conflicting evidence; it was given by a certified public accountant, under oath, who completely refuted the state's evidence of probable cause. (A.C. Jt. App. at A-1026-40).

IV.

THE QUESTIONS ARE IMPORTANT

We petition this Court to grant a writ of certiorari to the Second Circuit Court of Appeals because as to both questions presented there are serious conflicts among numerous circuit courts of appeals. This matter is particularly important because the questions involve a possible violation of Article III, Section I of the Constitution of the United States.

The Petitioners allege that the decisions in the Second Circuit, and the other circuit courts of appeals, such as the Seventh Circuit, which, we believe, reached similar conclusions, are in conflict with the rationale of the majority of this Court in *United States v. Raddatz*, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980), and underscore the concerns of the dissenting justices. We argue that the circuit courts of appeals, which fail to employ strict objective standards to challenge a district judge's assertions that he or she performed a *de novo* review of a magistrate's findings and recommendations or which fail to use a "plenary" or "independent" standard to review a district court's decision which is summary or contains errors, will not provide the rigorous oversight of the findings and recommendations of a magistrate judge that Congress and this Court in *Raddatz* required. We argue that this is what happened in our case, although as to several points of contention, clear error was also present.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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